

should not attempt to address, through the promulgation of new and complex policies, *separate* standards for the mere *potential* of overreaching.

G. THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE SHOULD BE ELIMINATED OR SUBSTANTIALLY RELAXED.

54. In its *NPRM*, the Commission noted that at present, it is statutorily prohibited from expending any of its appropriated funds for the purpose of repealing, amending or otherwise reexamining the rules set forth in 47 CFR §73.3555(d), the Newspaper-Broadcast Cross-ownership (“NBCO”) rules,³⁸ other than to amend policies with respect to waivers of the NBCO rule as it applied to radio and newspaper cross ownership.³⁹ Comment was invited as to the effect of the statute on proposals to amend the attribution rules.

55. FOE understands and acknowledges that the Commission may not adopt amendments to Section 73.3555(d) in this proceeding that would have the effect of repealing or substantially relaxing the NBCO rule. However, FOE believes that it is within the Commission’s statutory power as an independent regulatory agency, to make recommendations to Congress that the present restriction against such rule making authority be lifted or repealed. Moreover, both

³⁸The rule is currently set forth in 47 CFR §73.3555(d):

No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with §73.183 or §73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with §73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with §73.684, encompassing the entire community in which such newspaper is published.

³⁹*NPRM*, ¶12, NOTE 4.

the Commission and Congress are bound by the United States Constitution, including the First Amendment thereto. To the extent that continued enforcement of the NBCO rule constitutes a direct violation of the First Amendment, the Commission's duty is clear, notwithstanding any appropriations directives from Congress. As shown below, the continued enforcement of the NBCO rule constitutes a serious infringement of freedom of expression. Whatever purpose such a rule may have had when originally adopted, its sole effect now is to further endanger an already endangered institution--the daily newspaper, and to inhibit broadcasters from effecting combinations that will be able to withstand the superior competitive advantages enjoyed by other forms of electronic media, including cable television and telephone companies engaged in or soon to be engaged in video dial-tone and multi-channel on-line communications services.

56. The NBCO Rules were first proposed by the FCC in 1968, in order to codify a general proscriptive rule. Up until that time, the Commission had been proceeding on a case-by-case basis in determining whether a proposed newspaper-broadcast combination would constitute an undue concentration of media control in a particular market. The case-by-case method favored the proposed combinations in most instances.

57. While initially proposing the complete breakup of newspaper-broadcast combinations over a five-year period, the Commission adopted a policy which proscribed *future* newspaper-broadcast combinations, but "grandfathered" all but a handful of "egregious cases," the owners of such co-located properties being ordered to divest.⁴⁰ Part of the reason for the Commission's change of heart had been the statistical evidence submitted during the NBCO proceeding that newspaper-owned television stations actually produced a larger percentage of news,

⁴⁰*Second Report and Order* Docket 18110, released 1/31/75).

public affairs, and other public service programming than did independently owned television stations. In addition, the Commission also expressed the fear that a complete breakup would cause such instability in the industry as to *disserve* the public interest, convenience and necessity.

58. Moreover, in announcing the adoption of the NBCO Policy, the Commission made no findings that newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily speak with one voice, to the detriment of the public interest. No conclusions were drawn as to whether such combinations were harmful to competition, and the Commission expressly stated that it had found no pattern of specific abuses by existing cross-owners.⁴¹ Despite this lack of evidence, the Commission adopted the Policy, and codified it into what is now 47 CFR §73.3555(d).

59. On appeal, however, the D.C. Circuit reversed that portion of the rules which grandfathered existing combinations, and ordered the FCC to adopt a rule requiring divestiture of all such combinations. Given the primary goal of the FCC to promote *diversity of thought and opinion* in its broadcast licensing decisions, the Court said that considerations such as industry stability and a past history of public service were entitled to little weight, and that the Commission was compelled to announce a *presumption*, as a matter of law, that co-located newspaper-broadcast facilities do not serve the public interest.⁴²

60. The U.S. Supreme Court reversed. While it upheld the constitutionality of the NBCO Policy, it agreed with the FCC that full-scale divestiture was unnecessary. The Court said that industry stability and public service were legitimate public interest goals which the FCC was entitled to take into account,

⁴¹*Id.*, 50 FCC 2d at 1072, 1099.

⁴²*National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

and that the decision to make the NBCO Rules prospective in application only was permissible as a reasonable agency response to changed circumstances in the broadcasting industry.⁴³

61. In 1987, FOE petitioned the Commission to institute Rule Making proceedings looking to the repeal of the NBCO Policy. A number of other parties filed comments in support of FOE's petition. As a result of Congressional intervention in the form of a rider to an appropriations bill,⁴⁴ the Commission declined to initiate rule making proceedings.⁴⁵ FOE believes it is once again appropriate to question whether the public interest is being served by the Policy in view of the proliferation of media, and the competitive disadvantages now faced by broadcast licensees.

62. While grandfathered newspaper-broadcast combinations have remained relatively stable since 1975, the face of the media marketplace today has

⁴³*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

⁴⁴Public Law No. 100-202 (Dec. 22, 1987) (also referred to as the *Hollings Amendment*).

⁴⁵It was no secret that the appropriations rider had been aimed at Rupert Murdoch, who, through his acquisition of Metromedia, had also acquired ownership of television stations in the New York and Boston markets, in which he also owned daily newspapers. The rider to the appropriations bill passed and President Reagan did not veto the measure.

NewsAmerica Publishing, Inc., owned by Murdoch, then sought an extension of the temporary (18-month) waivers it had received earlier. After being turned down by the FCC which cited the Hollings Amendment, NewsAmerica appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and challenged the constitutionality of the amendment. The Court, while refusing to rule on the validity of the more general prohibition of funding for rule making proceedings, did strike down that part of the amendment which forbade the FCC from granting or extending waivers. The Court, after reviewing the legislative history and post-adoption colloquies on the Senate Floor, ruled that the amendment had targeted Murdoch so specifically and exclusively as to be tantamount to a "bill of attainder," a violation of the First Amendment, and a denial of Murdoch's rights to equal protection under the Fifth Amendment. (*NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (1988)). The more general question of whether Congress could keep the FCC from reexamining the NBCO Rules was deemed not yet ripe for review.

changed beyond all recognition. The lack of diversity which Congress, the Department of Justice, and the FCC were lamenting in the 1970's has turned into an uncontrolled explosion of electronic media choices that brings with it new problems in economic stability and spectrum management. Market domination, however, is not one of them. In 1985 the Commission announced that its goal of media diversity had been essentially achieved in all markets, and that heavy-handed government intervention in the form of content, and even arbitrary structural regulations, were no longer necessary and perhaps even counterproductive.⁴⁶

63. The number of diverse sources of information has increased tremendously from the time of the implementation of the NBCO Policy. This upsurge in diverse sources of voices, however, has been tempered by the downward spiral of daily newspapers in this country. Since the adoption of the rules in 1975, the number of daily newspapers in this country has declined by 219.⁴⁷ Such a decline in the viability of an historically important institution poses a danger to our democratic society.

64. The governmental interest which formed the basis for the adoption of the NBCO Policy has substantially evaporated. As noted above, the basis given by the Commission, and accepted by the Supreme Court,⁴⁸ as justification for the Policy was that it would promote the First Amendment related goal of diversity

⁴⁶See *Syracuse Peace Council*, 2 FCC Rcd 5043, 63 RR 2d 541, 576-577 (1987).

⁴⁷In 1975 there were 1,756 Dailies; in 1994 there were only 1,538. American Newspaper Publishers Ass'n. *Facts About Newspapers*, 1995, p.17. Although new dailies have been started since 1975, there has been a decline in the total number of dailies being published every year since 1960. *Id.* The most recent victim of this appalling attrition was THE HOUSTON POST, bought out by the competing HOUSTON CHRONICLE, which promptly closed it down. "A One-Newspaper Town," TIME, May 1, 1995, p.33.

⁴⁸The NBCO Policy was upheld by the U.S. Supreme Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

of voices in a media market, and to address antitrust considerations. Ten years later, however, the Commission acknowledged that diversity had been achieved in virtually every market, and that restrictions on freedom of expression can no longer be justified by reference to such a goal.⁴⁹ And, except in a handful of the smallest markets where antitrust considerations may warrant some restrictions on media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given market.⁵⁰ Since the validity of the rule no longer exists, that rule cannot withstand constitutional scrutiny.⁵¹

65. Further, it would appear that continued enforcement of the NBCO Policy is counterproductive to the stated goals of "diversity." The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress enacted the NEWSPAPER PRESERVATION ACT.⁵² The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the arrangement, not more than one of the newspaper publications involved in the performance of such an arrangement was likely to remain or become a financially sound publication.⁵³

66. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by

⁴⁹See eg., *Syracuse Peace Council*, *supra*.

⁵⁰Moreover, a total ban on newspaper-broadcast cross-ownership is hopelessly and constitutionally overbroad as a means of serving any valid governmental interest in anticompetitive activity.

⁵¹See, *Geller v. FCC*, *supra*; *Home Box Office v. FCC*, *supra*.

⁵²PUBLIC LAW 91-353, 15 U.S.C. §1801.

⁵³See 15 U.S.C. §§1801-1803.

Congress in the implementation of the NEWSPAPER PRESERVATION ACT as well.⁵⁴ FOE respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

67. The elimination of the NBCO Policy would enhance broadcast program service. In its initial Rule Making adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.⁵⁵ That co-located newspaper-broadcast combinations had provided “undramatic but nonetheless statistically significant superior” program service in a number of program particulars was too clear in the record to be denied by the Commission.⁵⁶

68. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of scale through a greater revenue base and considerations of space, consolidation,

⁵⁴That Congress apparently acted itself in conflict with the Act, by prohibiting the FCC from conducting Rule Making proceedings to repeal the NBCO Policy, is explained by the political motivations of the Congressional Leaders at the time. As found by the U.S. Court of Appeals, which overturned a portion of that legislation, debate on the floor clearly indicated that the legislation was directed at a single individual, Rupert Murdoch, owner of Fox Broadcasting and, at that time, daily newspapers in both Boston and New York, which newspapers at times were extremely critical of certain U.S. Senators. Based upon the remarks of some senators during the debate, it was clear that the rider was retaliatory in nature, and an attempt to suppress free speech. See, *NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

⁵⁵See, *Newspaper Broadcast Cross Ownership Policy*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

⁵⁶*Id.*

and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the Newspaper-Broadcast Cross Ownership Policy would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.

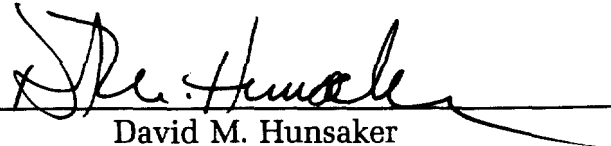
69. As noted above, FOE acknowledges that the Commission is presently prohibited by Congressional appropriation legislation from completely repealing the NBCO rule. FOE respectfully submits, however, that it is both permissible and appropriate for the Commission to *declare* in the Report and Order to be issued in this proceeding, that, as a matter of policy, the NBCO rule is counterproductive to the goals of media competition and diversity, that it is an unjustified restraint on the freedom of expression not supported by any compelling governmental interest, and accordingly, no longer serves the public interest, convenience and necessity. The Commission should also urge Congress to repeal the present legislation inhibiting Commission action.

CONCLUSION

WHEREFORE, the above premises considered, FOE respectfully urges the Commission to ISSUE a Report and Order ADOPTING the policy recommendations made herein, and to RECOMMEND to Congress that the Newspaper-Broadcast Cross-Ownership Policy be repealed.

Respectfully submitted,

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May 17, 1995

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